

1
2
3
4
5
6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 ACUPUNCTURE AND WELLNESS
10 CENTER, P.S.,

11 Plaintiff,

12 v.

13
14 BRAD WHISNANT, and PINPOINT
15 ACUPUNCTURE CLINIC, P.S.,

16 Defendants.

Case No. C17-0269RSL

ORDER GRANTING
IN PART DEFENDANTS'
MOTION TO DISMISS

17
18 This matter comes before the Court on “Defendants’ 12(b)(6) Motion to Dismiss
19 Certain Claims.” Dkt. # 9. The question for the Court on a motion to dismiss is whether
20 the facts alleged in the complaint sufficiently state a “plausible” ground for relief. Bell
21 Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). All well-pleaded allegations are
22 presumed to be true, with all reasonable inferences drawn in favor of the non-moving
23 party. In re Fitness Holdings Int’l, Inc., 714 F.3d 1141, 1144-45 (9th Cir. 2013). If the
24 complaint fails to state a cognizable legal theory or fails to provide sufficient facts to
25 support a claim, dismissal is appropriate. Shroyer v. New Cingular Wireless Servs., Inc.,
26 622 F.3d 1035, 1041 (9th Cir. 2010).

27
28
ORDER GRANTING IN PART
DEFENDANTS’ MOTION TO DISMISS - 1

1 Having reviewed the complaint and the parties' memoranda, the Court finds as
2 follows:

3 **BACKGROUND**

4
5 Plaintiff Acupuncture and Wellness Center is a full-service clinic that specializes
6 in traditional Chinese medicine. Dkt. # 1 ¶ 7. Plaintiff also offers online seminars to
7 educate other practitioners about this field of medicine. Id. ¶¶ 8, 11. Plaintiff alleges that
8 sometime around October 10, 2011, defendant Brad Whisnant viewed plaintiff's online
9 seminar titled "Treatment of Pain and Acupuncture and Chinese Herbs: How to Make It
10 All Go Away! Part I (Upper Body)." Id. ¶ 14. Plaintiff asserts that defendant Whisnant
11 also signed a non-disclosure agreement. Id. ¶ 15.

14 Around March 11, 2016, defendant Whisnant published the book "Fast Neck and
15 Back Pain Relief with Acupuncture: How to Use the Balance Method and Master Tung
16 Acupuncture for Instant Neck and Upper Back Pain Relief." Id. ¶ 16. Plaintiff asserts that
17 portions of this book were lifted from plaintiff's seminar in violation of federal copyright
18 law. On January 25, 2017, plaintiff filed an application with the United States Copyright
19 Office to register its 2011 seminar as a prerequisite to filing suit. Dkt. # 1, Ex. B.
20
21 On February 21, 2017, plaintiff filed the instant action alleging copyright infringement
22 and breach of the non-disclosure agreement. Defendants¹ ask the Court to dismiss both
23 claims.
24
25
26

27 ¹ Defendant Brad Whisnant is the president of Pinpoint Acupuncture Clinic, the other named
28 defendant in this case.

DISCUSSION

1. Copyright infringement

Defendants argue that the copyright claim should be dismissed because plaintiff's acupuncture seminar describes an idea or process that is not subject to copyright protection. Dkt. # 9 at 6; see also 17 U.S.C. § 102(b). When a work is registered with the United States Copyright Office within five years of its initial publication, there is a presumption that the copyright is valid. 17 U.S.C. § 410(c). If the Copyright Office issues a Certificate of Registration after five years, then the evidentiary weight of the Certificate is left to the discretion of the Court. Id.

Plaintiff's online seminar was published on October 10, 2011, but it was not registered with the Copyright Office until January 25, 2017.² Although courts sometimes vary in the deference they afford the Copyright Office in these circumstances (see, e.g., Inhale, Inc. v. Starbuzz Tobacco, Inc., 755 F.3d 1038, 1041-42 (9th Cir. 2014)), for purposes of a motion to dismiss, the existence of a registered copyright raises a plausible inference that the material is copyrightable. The copyright infringement claim may therefore proceed.³

² While the Court generally does not consider materials beyond the pleadings in the context of a Rule 12(b)(6) motion, the Court may consider certain documents that form the basis of the plaintiff's claim. See Friedman v. AARP, Inc., 855 F.3d 1047, 1051 (9th Cir. 2017). In this case, the Court takes judicial notice pursuant to Fed. R. Ev. 201(b)(2) of the Certificate of Registration. See Dkt. # 13, Ex. B.

³ Defendants request a more definitive statement regarding the alleged infringement under Fed. R. Civ. P. 12(e). Dkt. # 9 at 3. Granting a Rule 12(e) motion is appropriate when plaintiff fails to give notice to defendants of the substance of the claims against them. Hayton Farms Inc. v. Pro-Fac Corp., No. C10-520RSM, 2010 WL 5174349, at *4 (W.D. Wash. Dec. 14, 2010). Because

1 **2. Attorney's fees, costs, and statutory damages**

2 Defendants seek dismissal of plaintiff's request for attorney's fees, costs, and
3 statutory damages. Dkt. # 9 at 4. With limited exceptions, these remedies are available
4 only if the copyrighted work was registered before the infringement commenced. 17
5 U.S.C. § 412(2); see also Derek Andrew, Inc. v. Proof Apparel Corp., 528 F.3d 696, 699
6 (9th Cir. 2008). In this case, defendants' alleged infringing activity occurred more than
7 ten months before plaintiff registered its 2011 seminar with the Copyright Office. Dkt.
8 # 1 ¶¶ 13, 16. Because the seminar was not registered until after the infringement and
9 none of the exceptions apply, the statutory fee remedies are not available to plaintiff as a
10 matter of law.
11

12 **3. Non-disclosure agreement**

13 In addition to copyright infringement, plaintiff also alleges that the publication of
14 defendant Whisnant's book violates the terms of a non-disclosure agreement he signed on
15 June 18, 2016. Dkt. # 1 ¶¶ 26-27, Ex. A.⁴ The book at issue was published around March
16 11, 2016. Dkt. # 1 ¶ 16. As a matter of law and logic, defendants cannot breach an
17 agreement that was not signed until after the alleged breach occurred. Plaintiff's claim for
18 breach of the non-disclosure agreement is DISMISSED.
19
20
21
22
23

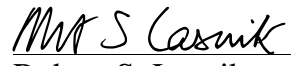
24
25
26 the complaint provides adequate notice to defendants and more details will emerge through
27 discovery, the request for a more definitive statement is DENIED.

28 ⁴ The date is handwritten and difficult to read. It is possible that the non-disclosure agreement
was instead signed on June 10, 2016, or October 6, 2016. The fact is immaterial, however,
because the book was published before any of these dates.

1 **CONCLUSION**

2 For all of the foregoing reasons, defendants' motion (Dkt. # 9) is GRANTED in
3
4 part. Plaintiff's copyright infringement claim may proceed, but plaintiff is not entitled to
5 statutory damages, costs, and attorney's fees. Plaintiff's claim for breach of the non-
6 disclosure agreement is DISMISSED.

7
8 Dated this 8th day of January, 2018.
9

10
11 
12 Robert S. Lasnik
13 United States District Judge
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28